IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN, and KAREN LEE GOTTESMAN, individually and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of the State of New York, JOHN P. LOMENZO, Secretary of State of the State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of the State of New York, JOHN P. LOMENZO, Secretary of State of the State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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The petitioners herein respectfully move this Court for an order (1) vacating its order affirming the decision of the Court below entered on March 21, 1973, and (2) granting rehearing herein. As grounds for this motion, petitioners state the following:

I.

The Court erroneously failed to consider petitioners' contention that Section 186 is in violation of the Voting Rights Act of 1970.

In refusing to pass upon petitioners' contention that Section 186 of New York's Election Law was in violation of 42 U.S.C. §1973(a)(a)-1(d), a majority of the Court ruled that petitioners, as long-time residents of New York, lacked standing to challenge the durational residence requirement established by Section 186. However, whatever the correctness of such a rigid view of standing,[1] it has no application to petitioners' invocation of the Voting Rights Act of 1970, since the 30 day limitation contained therein was explicitly designed to benefit both long-time residents as well as newly arrived voters. Cf. *Association of Data Processing Serv. Organizations* v. *Camp*, 397 U.S. 150 (1970). On March 11, 1970, on the eve of Senate passage of the Voting Rights Act of 1970, Senator Goldwater delivered the principal floor speech discussing 42 U.S.C. §1973(a)(a)-1(a), in which he stated:

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[1] E.g., Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962); Jaffee, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

"To put it bluntly, the election system of the world's greatest republic and democracy is not geared to insuring that the maximum number of citizens will be eligible to vote. In many ways it even discourages or makes it impossible for citizens to register . . .

"Mr. President, the record should show that there is another important group of citizens who will benefit from the requirement that States shall keep their voting lists open until at least 30 days before a Presidential election.

"The point must be made absolutely clear that my amendment is intended to remove all the insidious effects which these archaic statutory limitations may have on a citizen's free exercise of his right to choose the President.

"To this end, my proposal is expressly designed to help not only new residents of a State but also citizens who have lived for a long time in a state.

"Mr. President, one of the most bizarre features now included in some States' election laws is the fact that citizens who have just moved into a State may register to vote as late as 30 days or even 5 days before a Presidential election, but longtime residents of that same State are required to apply for registration as much as nine months before the election.

"What nonsense. Nine months prior to the election few people may be thinking about that event. But by 30 days before the polls open, political interest will have reached fever pitch.

"So, I want to make it very clear that my proposal is intended to mean that all citizens, both new residents

> *and longtime residents shall be permitted to register or otherwise qualify to vote for their President at least until 30 days before the election." Congressional Record,* March 11, 1970, pp. 6989-6995 (emphasis added).

Read against the background of Senator Goldwater's explicit intention to confer benefits upon long-time residents, the majority's refusal to consider petitioners' contention that 42 U.S.C. §1973(a)(a)-1(d) of the Voting Rights Act of 1970 applies to Presidential primaries, as well as to the general election, was clearly erroneous.

II.

The Court erroneously characterized petitioners' failure to have registered for the 1971 local elections as a volitional act justifying their exclusion from the 1972 Presidential primary.

On at least three occasions, the majority alludes to petitioners' volitional failure to have registered during 1971 as a justification for placing onerous restrictions upon their ability to participate fully in the 1972 Presidential elections. *Slip Opinion,* p. 3, n. 4; p. 6, p. 10. Indeed, the crux of the majority's opinion appears to be contained in its observation that:

> "The petitioners do not claim that they were unaware of New York's deadline for enrollment." *Slip Opinion,* p. 6, n. 6.

However, Judge Mishler, writing for the District Court, in rejecting the contention that petitioners waived their voting rights by not registering in 1971, expressly stated

what every person involved in New York elections knows to be true—that thousands of New Yorkers are disenfranchised annually by Section 186 without even an inkling of its existence. Lest there be any doubt concerning the matter, petitioners unequivocally assert that they were totally unaware that in order to vote in a June Presidential primary, it was necessary for them to have registered by the preceding October 2. No such requirement exists anywhere else in the United States and it is patently unfair to attribute notice of such a unique voting bar to young voters seeking to register for the first time. Cf. *Moser* v. *United States*, 341 U.S. 41 (1951).

The injustice of treating petitioners as though they had wilfully failed to satisfy Section 186 is heightened by the fact that New York's unique eight to eleven month cut-off is not even spelled out explicitly in its Election Law. It must be gleaned, instead, from a highly complex set of interrelated statutes which have the *effect* of establishing the cut-off without ever explicitly establishing it. Counsel submits that, prior to this case, fewer than 20 election lawyers in the State of New York understood the convoluted operation and impact of Section 186. To ascribe notice of Section 186 to thousands of unsophisticated persons attempting to register for the first time constitutes the imposition of an unduly harsh legal fiction in conflict with reality and with the finding of the District Court.

Finally, the assumption by the majority that a major distinction exists between those impediments which "totally" deny the franchise and those impediments which merely render it "difficult" to vote is demonstrably unsupportable.

Non-participation in the electoral process has reached critical proportions in the United States, but nowhere is it a more pervasive problem than in the City and State of New York. In the three most populous boroughs of New York City (Manhattan, Brooklyn and the Bronx), voter participation in the 1972 Presidential election hovered at 40 per cent of the eligible electorate. In marked contrast however, to the appallingly low level of general voter participation was the finding that 89.6 per cent of the registered electorate voted in the 1968 Presidential election. Thus, it is now universally accepted that the primary impediment to increased participation in the electoral process is cumbersome and archaic voter registration machinery, exemplified by Section 186 of New York's Election Law, which makes it difficult—although not "totally" impossible—for unsophisticated members of racial and ethnic minorities to participate in the electoral process. Kelley, Ayres and Bowen, *Registration and Voting: Putting First Things First,* 61 American Political Science Review, 359 (1967); *Beare* v. *Smith,* 321 F. Supp. 1100 (S.D. Tex. 1971); *Bishop* v. *Lomenzo,* 350 F. Supp. 576 (E.D.N.Y. 1972); *Young* v. *Gross,* 462 P.2d 445 (1972).

By appearing to insulate such cumbersome machinery from meaningful judicial review merely because it does not "totally" disenfranchise prospective voters, the majority's opinion insures the continuation of an electoral system which, in Senator Goldwater's words:

> "... is not geared to insuring that the maximum number of citizens will be eligible to vote. In many ways it even discourages or makes it impossible for citizens to register ..." *Congressional Record,* March 11, 1970, p. 6989.

As the Kelley study establishes, a direct, statistically demonstrable, correlation exists between electoral participation and the removal of cumbersome registration provisions such as Section 186. Given such an unquestioned statistical correlation, it is the blind erection of a distinction without a difference to provide meaningful judicial review for "total" disenfranchisement, but to refuse to provide meaningful review for cumbersome provisions short of "total" disenfranchisement which have the identical practical effect of barring the franchise to millions of Americans.

Moreover, it cannot be disputed that our patchwork of onerous election laws—exemplified by Section 186—operates with disproportionate severity upon the very segment of the American electorate which has historically suffered "total" disenfranchisement—members of racial and ethnic minorities. The Kelley study demonstrates beyond a doubt that statutes like Section 186—erecting cumbersome and difficult barriers to voting—act primarily to exclude Blacks, Puerto Ricans and Chicanos from exercising the franchise. Middle America, highly literate and politically sophisticated, experiences little difficulty in surmounting the essentially administrative hurdles to registration. But that segment of the American electorate which lacks verbal skill and political sophistication is excluded from the ballot as effectively as if they had been "totally" disenfranchised.

If the effects of prior discrimination in access to the ballot can be insulated from meaningful judicial review merely because a state law having the effect of excluding unsophisticated persons from the ballot is framed short of

"total" disenfranchisement, the continued estrangement of millions of Americans from our democratic system will be insured. Petitioners urge the Court, at the least, to remand this matter for a plenary evidentiary hearing on the "total" disenfranchising effect which Section 186 and similar statutes exercise upon unsophisticated voters seeking to join the political process for the first time.

Respectfully submitted,

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Certificate of Counsel

As counsel for the petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay pursuant to Rule 58(1).

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